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In The  
**Supreme Court of the United States**

**October Term, 1978**

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**No. 78-394**

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ANGELO COSTANZO,

*Petitioner,*

vs.

UNITED STATES OF AMERICA

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**On Petition for a Writ of Certiorari to  
The United States Court of Appeals  
for the Second Circuit**

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**PETITIONER'S REPLY TO  
MEMORANDUM IN OPPOSITION**

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**I. *Respondent's Point (1):***

In his first point, Respondent offers two rationales for sustaining Petitioner's conviction and denying certiorari:

- i. Petitioner did not contest that the Government's evidence showed the corporation "... a likely source of at least a substantial portion of the unreported income ..." and
- ii. The error of the Court of Appeals should be overlooked (Resp. 3-4).

i. With respect to the first rationale, the petition herein posits that proof of a likely source is inadequate because proof of specific source is required. Petitioner maintains this effectively challenges any contention based on a finding of likely source. Respondent asks, however, that the conviction herein be sustained.

Respondent himself sets forth the essential requirements for obtaining a conviction:

"... where, as here, the Government seeks to prove an evasion of both corporate and personal taxes ..."

Those requirements are:

"... [the Government] must show that corporate income was the source of the increase in the shareholder's net worth." (Resp. 3).

Due process requires that such showing be by proof beyond a reasonable doubt (*In re Winship*, 397 US 358, 364 [1970]).

It follows that the same showing must be required in order to sustain a conviction.

Respondent now asks, however, that the conviction herein be sustained on the basis that:

"The Government's evidence showed ... that the ... [corporation] was a likely source of at least a substantial portion of the unreported income charged in the indictment" (Resp. 4).

The Respondent would thus refashion the requirements for obtaining or sustaining conviction to read as follows:

Where, as here, the Government seeks to prove an evasion of both corporate and person taxes, the Government must show that the [corporation] was a likely source of at least a substantial portion of the unreported income alleged in the indictment.

Does this pass due process muster? To answer, let us turn to the standard of proof required to show a likely source. This Court, in *Holland*, set forth that standard as:

"proof ... from which the jury could reasonably find that the net worth increases sprang is sufficient" (*Holland v. United States*, 348 US 121, 136).

Conforming Respondent's request to the standard of proof thus underlying it, Respondent is, in reality, asking this Court to approve and apply the following rule:

To obtain or sustain a conviction "where as here the Government seeks to show an evasion of both corporate and personal taxes ..." the Government must introduce "proof ... from which the jury can reasonably find that the net worth increases sprang ..." from corporate income.

Clearly, this is not the equivalent to the original formulation requiring proof beyond a reasonable doubt

"that corporate income was the source of the increase in the shareholder's net worth."

Just as clearly, the conviction herein must be vacated.

ii. In his second rationale, Respondent further encourages the Court to deny review and sustain conviction

"... despite the statement of the court of appeals that proof of a likely source of taxable income was not necessary ..." (Resp. 3).

The Respondent would have the Court believe the court of appeals error was of no consequence. Yet the consequences were profound. The court of appeals held that a) Petitioner's presentation of direct evidence and b) Petitioner's cross-examination of prosecution witnesses were each properly limited in part because proof of source was not necessary:

"Further, neither cross examination nor direct evidence on these two points [gross profit percentage and physical production capacity of the bakery] could have aided the taxpayer. Given the Government's proof of unreported income and its negation of all possible sources of non-taxable income, proof of a likely source of taxable income was not necessary, as we have seen. (Pet. App. A-12)"

In addition, it is also clear the Court of Appeals reviewed Petitioner's conviction from the perspective that proof of source (likely or specific) was unnecessary.

At trial, the Government somewhat gratuitously (for Petitioner never claimed gift or inheritance) undertook to negate all non-taxable sources of personal income, and indeed, such negation carried the cause apparently at both trial and appellate levels. Respondent effectively concedes, however, that this was error, and that to sustain conviction of evasion of corporate income tax and personal income tax on essentially the same money, it is necessary to prove beyond reasonable doubt (1) unreported taxable income to the corporation (2) which, in turn, became unreported taxable income to the individual (3) which, in turn, was used to purchase assets from which increase in individual net worth was derived.

It must be remembered that in its net worth prosecution, the Government asked the jury — just as Respondent now asks this Court — to draw inferences of Petitioner's guilt from all the circumstantial evidence it presented. Yet, the entire perspective of trial ("we are not here to test the efficiency of the [bakery] operation" [Pet. 11]) and appellate review ("proof of a likely source of taxable income was not necessary" [Pet. 8]) led emphasis away from the very elements which the Government has conceded were essential to proving the evasion of personal and corporate tax.

To overlook the actual and operative holding of the Court of Appeals would take both trial and appellate review entirely out

of the context in which they occurred. Sustaining Petitioner's conviction would thus require substantial realignment of evidence adduced at trial and reviewed on appeal under legally unsound premises. As well, denial of review by this Court would confer tacit approval as precedent of a new rule allowing a criminal conviction derived without applying the proof beyond a reasonable doubt standard to essential elements of that conviction.

Petitioner urges that under such circumstances, this Court ought not grant Respondent's request to deny certiorari and sustain conviction.

## II. *Respondent's 2 and 3:*

Respondent misapprehends the second point of the petition. Traditional due process considerations place an obligation of basic fairness upon Government conduct in general. In the context of net worth investigations and prosecutions, this obligation has been described in somewhat more particular terms: the duty to pursue taxpayer leads; the duty to use circumstantial evidence with studied caution; the duty to seek justice rather than conviction.

Within this context, Petitioner asserts that the natural consequence of these duties is an obligation to protect the taxpayer from unfounded adverse inferences, to wit: a duty not to present the jury with circumstantial evidence for the sake of an incriminating inference unless an effort has been made to investigate the validity of that inference. This duty may be affirmatively expressed as a good faith obligation to investigate and compile facts and circumstances thoroughly. Petitioner contends that this duty was not met:

- a. When the Government failed to inquire why Petitioner went to his safety deposit box before the Government inventory, yet presented that fact at trial to support an inference of guilt; and

b. When the Government urged dollar inferences about the bakery without cross-verifying whether the business had in fact the actual capacity to generate those dollars.

In Respondent's Point 2, Respondent advances a burden of proof argument to rebut this issue concerning the duty to investigate fairly and thoroughly:

"there is no requirement that the Government prove each element twice."

"the Government introduced evidence from which the jury could have concluded the corporation was the source of the unreported income" (Resp. 4).

It thus appears Respondent's position is that, because there was a conviction, the duty to investigate fairly and thoroughly was satisfied. This is directly contrary to the *Holland* admonition that the duty to seek justice in net worth prosecutions must not be misconstrued as being solely to seek convictions. The very danger to be guarded against is that a conviction might be obtained by use of circumstantial evidence developed in a foreshortened manner. Rebuttal grounded in the rhetoric of conviction is thus no rebuttal at all.

In Respondent's Point 3, concerning the safety deposit box, Respondent does not deny that the Government failed to verify the inferences of guilt it asked the jury to draw from Petitioner's entry into the box just prior to inventory. Rather, he urges Petitioner was obliged to make palliative efforts to dispel the unverified incriminatory inference. Once again, Respondent attempts to shift the focus of the Government's investigative duty exclusively into the adversarial trial forum. But since the Government's investigative burden is based on fairness, not adversity, it applies at all stages of official inquiry and cannot be excused by the lack of defense proof at trial.

The second point of the petition is that the Government fell far short of its good faith duty by encouraging the jury to infer guilt

from circumstance without having attempted to verify the validity of that inference.

The issue is clear and the crucial question for this Court is whether the Government should have attempted to verify the accuracy of its investigation.

For the reasons stated in the petition and this response, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully,

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